

Chapter 7

Equalizing the Will of the States and the Will of the Nation

Abstract The current U.S. presidential election system is quite complicated, and many Americans prefer a simple system they can better understand. Today, the “winner- take-all” method for awarding state electoral votes makes the will of the states matter and the will of the nation as a whole irrelevant in electing a President. Any direct popular election would make the will of the nation as a whole matter and the will of the states irrelevant. Thus, replacing the current system with a direct popular election system would mean replacing one extreme approach to electing a President with another. This chapter presents the author’s plan to improve the current election system, which keeps the Electoral College, but uses it only as a back-up election mechanism. The plan would provide the same principle of equal representation of the will of the nation as a whole and the will of the states in electing a President that exists in Congress in making any bill a federal law. Under the author’s plan, direct popular elections of a President and a Vice President would determine the will of the states and the will of the nation as a whole, and the states would be considered as equal members of the Union. Since the plan uses the current election system as a back-up mechanism, the chapter proposes a new method for awarding state electoral votes that may turn interested “safe” states into “battlegrounds.”

Keywords Automatic plan • Gallup polls • Direct popular election • Federal System Plan • Modified election system • National Bonus Plan • New method for awarding state electoral votes • President of an electoral majority in the Electoral College • President of the people • President of the states • “Pseudo-electoral” votes

The reader who has read all the previous chapters may be concerned with the uncertainty about (a) why one should change the current election system, and (b) what one would expect from new systems that may have a chance to replace the current one.

Three reasons seem to be explanatory. First, the current election system is quite complicated, and many Americans simply are not interested in weighing its pros and cons. They want to have a simple system that they understand and that is in use

in any elections in the country, except for presidential ones. Second, proponents of direct popular presidential elections try to convince the voters that this type of election is better for the country and that it is much fairer than what they currently have. Third, proponents of the National Popular Vote plan try to convince Americans that under this form of direct popular election, presidential candidates will allegedly compete in all the parts of the country, including small states.

However, holding direct popular elections may not be the best way to elect American presidents. Today, due to the way the “winner-take-all” method for awarding state electoral votes is used by the states and D.C. under the Electoral College-based presidential election system, the will of the nation does not matter in electing a President, and only the will of the states does. Under any direct popular election system, the will of the states would not matter, and only the will of the nation as a whole would. So replacing the current election system with any form of a direct popular election system would mean a switch from one extreme approach to electing a President to another. Voters in small states would hardly find a direct popular election system fairer than the current one if the candidates would compete and campaign only in densely populated metropolitan areas, where most of the voters reside.

The small states would matter in electing a President only if they were considered as equally important members of the Union, in just the same manner they are in electing a President in the House of Representatives, where each state has one vote, despite its size. If a state is not closely contested, the candidates would not find a reason to campaign there under any election system, except for the one in which every state is treated as an equal unit among all the 50 states and D.C. So under both the current system and any direct popular election system, the small states are likely to be ignored even if they are closely contested.

This chapter presents the author’s plan to improve the current election system, which keeps the Electoral College, but uses it only as a back-up election mechanism. The plan would provide the same principle of equal representation of the will of the nation as a whole and the will of the states in electing a President that exists in Congress in making any bill a federal law. Under the plan, direct popular elections of a President and a Vice President would determine the will of the states and the will of the nation as a whole, and the states would be considered as equal members of the Union. Since the plan uses the current election system as a back-up mechanism, the chapter proposes a new method for awarding state electoral votes that may turn interested “safe” states into “battlegrounds.”

7.1 Public Perception of the Current System and Its Alternatives

Possible extreme outcomes and stalemates in presidential elections may raise concerns about the current election system.

Some readers may believe that the time for certain changes in the system has come. They may expect that the changes would eliminate the very possibility of extreme situations in presidential elections. Some other readers may believe that an election system capable of delivering any extreme situations should be “punished” by replacing it with another one. (The direct popular election system is often viewed as an alternative to the existing one [6], [7]) Some readers may believe that the system that has successfully served the nation for more than two centuries should remain unchanged. Certainly, there may be some readers who do not care, especially those who do not vote in presidential elections. (Since more than 40 % of voters do not usually vote in presidential elections [68], this particular perception cannot, apparently, be ruled out). Finally, some readers may believe that any changes in the system or of the system itself are practically impossible, no matter how reasonable these changes could be.

The spectrum of possible perceptions of the election system seems to be in line with public opinion polls regarding abolishing the Electoral College. The Gallup polls conducted in February, April—May, and November 1967 showed that 58 %, 63 %, and 65 % of the respondents, respectively, were in favor of abolishing the Electoral College [6]. Public opinion polls held in 1968 and 1981 showed that 81 % and 75 % of their participants, respectively, also were in favor of such an action [10]. The Gallup polls conducted in October 2011 showed that 62 % of the respondents favored the abolition of the Electoral College [69]. Numerous modifications in the existing election system and variants of a new election system have been proposed over more than 200 years. Some of them were proposed by members of the government, especially by those of the Senate in 1968–1970 [70].

In addition, in 1967, the American Bar Association recommended replacing the existing system with a direct popular system of a particular kind. These recommendations were supported by the House of Representatives in 1969 and were close to gaining the needed support of the Senate in 1979 [4]. Nevertheless, scholars and political leaders are not united on this matter. While many of them oppose the idea of changing the system [10, 27, 71], some others suggest that certain changes in the system should be considered [9].

What underlies public perceptions of the election system? To answer this question, first, one should find out what this system was created for. Second, one should comprehend to what extent the currently existing election system, designed more than 200 years ago and modified many times since then, can satisfactorily serve society today.

The initial system was designed as a tool for electing a Chief Executive to govern the Union of the states [6, 9, 10, 22, 71]. As a result of a compromise, the elected Chief Executive was not supposed to have a mandate from the American electorate. This mandate was to be given to the Chief Executive either by electors or by the states in the House of Representatives. If electors were to fail to elect the Chief Executive, no run-offs in the Electoral College were allowed. Instead, the assembly of the states as equal members of the Union would choose a Chief Executive in this case. The Constitutional Convention participants viewed this assembly as the ultimate appointing power in electing a President.

Why did the Founding Fathers disallow the run-off elections in the Electoral College? They might have believed that the failure to elect a President there would have manifested a lack of agreement among electors on a leader to govern the Union at the time of holding the election. They might also have believed that no run-offs in the Electoral College could change the underlying intent of its members.

Changes that have been made in the election system since its creation have generated in the voters other views about the purposes of the system. Many of them believe that an elected President should have a mandate directly from the American electorate. In addition, throwing the election into Congress is often viewed as a disaster [8]. Therefore, numerous attempts to change the system have focused on eliminating the election of a President in the House of Representatives.

Artificially re-awarding electoral votes was proposed to replace the election of a Chief Executive in Congress. The idea of the replacement is always to elect a President who is a recipient of at least a plurality of the nationwide popular vote [70]. Popular elections with run-offs have been proposed many times, despite the fact that the use of such an election scheme can lead to stalemates in presidential elections. Indeed, people who firmly commit to particular beliefs may not change their vote in the course of the run-offs. If this is the case, the run-offs become senseless [22].

The proposed changes bear evidence that the views of both scholars in the field and many voters on the current election system do not coincide with those of the Founding Fathers. At the same time, despite all the deficiencies of the current election system, many voters believe that this system has successfully served the nation for more than two centuries [1, 9, 10, 22, 32, 71]. In any case, the discussion of the system usually emerges when the popular vote winner loses (or has a chance to lose) the election.

At first glance, one may expect that if the current election system always elected recipients of at least a plurality of the nationwide popular vote to the office of President, the results of the polls on abolishing the Electoral College would be different. However, even if this were the case, the concerns of advocates of the principle “one person, one vote,” which is not part of either the existing election system or of many of its known modifications [45, 72], would remain unaddressed. These concerns are often referred to as being in line with the Equal Protection Clause from the Fourteenth Amendment, the key in deciding the 2000 election outcome.

In addition, if certain election rules remain as fuzzy as they are, they may affect outcomes of presidential elections in the years to come. Finally, the current system seems to be too complicated to understand in depth, which may contribute to the unwillingness of many voters to vote in presidential elections. Some of them may consider it unreasonable to vote as long as many election rules remain as unclear and exploitable as they are.

Thus, finding whether the election system should be changed in any manner or be replaced with a new one seems expedient.

7.2 Three Basic Approaches to Improving the System

There are three basic approaches to improving the current election system that have been proposed over the more than 200 years since the creation of the Electoral College.

The first approach is based on the belief that the concepts and basic principles of the system should remain as they are. Some proponents of this approach believe that any changes in the fundamentals of the system may destabilize society. They also believe that those who push for the changes do not understand the danger of damaging the federal system of government and representation in the U.S. [27]. Some other proponents of the approach believe that necessary changes in the system can be made in a manner allowing one to avoid amending the Constitution.

Although beliefs of both kinds may seem reasonable, their substantiation is often unsatisfactory. In particular, the following two beliefs, plausible at first glance, are widely spread [27]:

- (a) The Electoral College forces a winning presidential candidate to demonstrate "... both a sufficient popular support to govern as well as a sufficient distribution of that support to govern... ."
- (b) Without the Electoral College, Presidents "... would be selected either through the domination of one populous region over the others or through the domination of large metropolitan areas over the rural ones... ."

However, the real situation seems to be contrary to these beliefs. The current election system gives superiority (if not a monopoly) to a small group of populous states always to have a chance to decide the election outcome. The 11 largest states can serve as an example illustrative of this statement. This superiority takes place under any low voter turnout in these 11 states and despite any voter turnout and the will of the voters in the rest of the country. In addition (see Sect. 4.4), the current system may (theoretically) allow only one large state always to determine the election outcome. The analysis of other beliefs of this kind can be found in the author's book [22].

Although many such beliefs regarding the election system are not substantiated, this does not mean that these beliefs do not have grounds. At the same time, any statements that these beliefs are in line with the attributes of the election system seem misleading and undermine the intentions of their authors.

Those who oppose these beliefs argue that the federal system of government and representation in the U.S. is based on the structure of Congress. This structure cannot be affected by changing the manner in which a President is elected [22]. Moreover, those who advocate a direct popular presidential election system in the U.S. may, apparently, refer to the Pledge of allegiance to the U.S. Flag [73]. They may believe that the words "... One nation ... indivisible..." should be interpreted in favor of having at least one representative in the Executive branch of the government with a mandate from the whole nation. These people may also argue that the principles of the election system, designed by the Founding Fathers, were

appropriate only at the time of their creation. They may submit that what was good for loosely associated states of free settlers cannot serve the integrated and unified American society.

Although these arguments make sense, one should clarify what it means that an elected President has a mandate from the whole nation. It seems that one can speak about such a mandate only if the following two requirements are met: First, more than 50 % of all eligible voters should have voted in the election, and second, more than 50 % of the voting voters should have favored (currently, the electors of) the same presidential candidate [22].

In the framework of the first approach, the idea to introduce a direct popular election of a President without abolishing the Electoral College surfaced soon after the 2000 Election [55]. This idea is based on exploiting the right of the state legislature to choose a manner of appointing electors [19]. (A detailed analysis of this idea is presented in Chap. 6.)

Under the “winner-take-all” principle of awarding electoral votes, the proposed idea would only amplify the already existing distortion of the intent of the Founding Fathers. The states with different election powers (if the election power of a state is understood as the number of the state electoral votes) would still make the first attempt to elect a President, whereas according to the Constitution, the states can elect a President only when (a) electors have failed to elect a President, and (b) a President is elected in the House of Representatives, and each state has one vote despite its size.

Moreover, this idea confuses the very goal of the Constitution, which is “... to form a more perfect Union ...” [19] rather than to outline a set of obstacles to be circumvented by the “ingenuity” of generations of Americans to come. Article 5 of the Constitution states when and how the Constitution should be amended. If more than one-third of the states do not want to change the system of electing a President, one should understand the reason underlying their viewpoint and debate it rather than force any decision on the matter upon these states.

No matter what new theories explaining the reasons underlying the creation of the Electoral College may be suggested in the years to come, it has been widely recognized that the idea of the Electoral College is part of the 1787 Great Compromise between the small and the large states that persuaded the small states to participate in the Union. Moreover, the “unfair” (as many scholars in the field believe) scheme for electing a President in the House of Representatives seems to illustrate that the large states agreed to sacrifice their obvious power in presidential elections for the sake of forming the Union. By signing the Constitution, the large states pledged to honor the right of the small states to be treated as equal members of the Union in electing a President in Congress.

The second approach is based on the belief that both the concepts and some basic principles of the election system can be changed though this may require changing the Constitution.

Some proponents of this approach believe that the Electoral College as an assembly of people should remain in a modified election system. However, methods for choosing electors should be changed, and the Maine-like district

method and the proportional method (see Sect. 2.9) were proposed as such changes [6, 30]. Some other proponents of this approach believe that the scheme for awarding electoral votes should be modified in such a manner that the winner of the nationwide popular vote would always win the electoral vote.

The so-called National Bonus Plan represents an attempt in this direction [10, 74]. One more group of proponents of the second approach focuses on changing the procedure for electing a President in Congress. Some even propose to replace this procedure with a run-off popular election if the Electoral College fails to elect a President [10].

Finally, as mentioned earlier, many proponents of reforming the existing system propose to replace it with a direct popular presidential election system [9]. These proponents believe that such a replacement is what the country needs to make the process of electing a President more transparent, more understandable, and more democratic. Certain merits and deficiencies of their plans have been analyzed and discussed, in particular, in [9, 10].

Among the plans to change the election system proposed in the framework of the second approach, one plan should specifically be mentioned. The so-called automatic plan, many times proposed, in particular, by political leaders [9, 10, 75, 76], consists of abolishing the office of elector while retaining all the other parts of the current election system. The idea of the plan is to authorize Congress to count electoral votes that are won by presidential candidates by popular vote directly and to eliminate the procedure of casting electoral votes.

In the author's book [22], electoral votes to be awarded by the states and D.C. and to be counted by Congress in the January that follows the election year are called "pseudo-electoral votes." The scheme for awarding and counting "pseudo-electoral votes" is also described there. The introduction of the automatic plan would eliminate an existing disparity between voters and electors in expressing their will. Currently, a voter may cast a vote in favor of only (the electors of) a pair of presidential and vice-presidential candidates among the pairs of the candidates on the national ticket. At the same time, a presidential elector may cast ballots for President and for Vice President in favor of the candidates from different such pairs.

The introduction of the automatic plan would make this impossible. Electors, whom the voters give the right to vote for President on behalf of the state of their residence, would not be able to distort the will of the voters. Introducing this plan would eliminate possible extreme election outcomes mentioned in examples from Sect. 2.2. Electing electors and electing a President would never be two unconnected elections. Only presidential candidates would be persons to whom "pseudo-electoral votes" would be awarded. Finally, the first attempt to elect a President on behalf of the states and D.C. would never devolve upon a group of only 538 American citizens.

At the same time, the Constitution requires the election of a President by the states to be consistent with the principle "one state, one vote." Therefore, the introduction of this plan would certainly change the original idea underlying the election system.

The third approach is based on the belief that certain parts of the current election system should remain attributes of the new one.

Various plans, called hybrids [7], have been proposed in the framework of this approach since the ratification of the Twelfth Amendment [70]. Three plans proposed in 1970, which contain helpful ideas, should specifically be mentioned.

The Federal System Plan was introduced by U.S. Senators Thomas Eagleton and Robert Dole. The plan proposes that a presidential candidate is elected to the office of President if this candidate is a recipient of a plurality of the popular vote nationwide, along with either (a) pluralities of the popular vote in each state from a majority of the states or (b) pluralities of the popular vote in each state from the states in which a majority of all the voters voted in the election.

If such a presidential candidate does not exist, a recipient of a majority of all the electoral votes that are in play in the election is elected President. Here, electoral votes are to be automatically awarded in the states and D.C. to the winner of the popular vote pluralities.

A recipient of an electoral vote majority may not exist in the election either. In this case, a President is chosen out of only two recipients of electoral votes. One is the presidential candidate who received the greatest number of electoral votes. The other is the candidate who received the number of electoral votes either equal to the same greatest number or the closest to this greatest number. Electoral votes that were won by the other candidates are reassigned between these two electoral vote recipients. The reassignment is done in proportion to the percentages of the popular vote received by these two candidates in the states whose electoral votes are reassigned. One of these two candidates with the greatest number of electoral votes “received” in this manner is elected President.

This plan incorporates both the automatic plan and the scheme of awarding electoral votes existing in the Electoral College. It abolishes electing a President in Congress, the third level of the current election system. The plan does not, however, address how only two candidates should be selected if more than two persons have won one and the same number of electoral votes. This plan also does not specify who is elected to the office of President if the two candidates “receive” one and the same number of electoral votes as a result of the above-mentioned reassignment of electoral votes.

Another plan introduced by Robert Dole combines the automatic plan, the existing scheme of awarding electoral votes, and the nationwide popular vote in choosing a President [70]. If a presidential candidate wins the popular vote in the election, this candidate is elected President. Otherwise, as in the Federal System Plan, a recipient of a majority of all the electoral votes that are in play in the election is elected President.

If neither such candidate exists, Congress elects a President out of the electoral vote recipients in a joint session. (A certain scheme for the participation of the District of Columbia is also proposed in the framework of this plan.) In this election, each member of Congress has one vote.

This plan does not address how many recipients of electoral votes out of more than two should be considered in electing a President in Congress. In any case, the plan modifies the existing scheme of electing a President in Congress.

A plan similar to Dole's was introduced by U.S. Senator William Spong. This plan also combines the automatic plan, the existing scheme of awarding electoral votes, and the nationwide popular vote in choosing a President [70]. A presidential candidate who receives a majority of all the electoral votes awarded in the election, along with a plurality of the popular vote nationwide, is elected President. If such a candidate does not exist, Congress elects a President in a joint session, where each member of Congress has one vote.

Like the Dole plan, this plan does not specify what presidential candidates should be considered in electing a President in Congress. In any case, similar to the Dole plan, this plan modifies the existing scheme of electing a President in Congress.

7.3 A New Plan for Electing a President

While the above three approaches to improving the existing election system may seem to cover all the plans proposed so far, the author's approach, outlined in [22], produces a different plan. The idea of the approach consists of retaining the existing election system (with only two changes) while incorporating this system into a new one, called the modified election system. In the modified system, the nationwide popular vote plays a key role in electing a President.

The author views the modified election system as a natural extension of the 1787 Great Compromise provision to have a dual representation of all the states in Congress. The people residing in each state are represented there via the House of Representatives, where the number of state Representatives reflects the number of the state inhabitants. In parallel, each state as a whole is represented in the Senate equally, by two Senators, despite the state's size. Any bill considered by Congress has a chance to become a federal law only if both chambers of Congress support it.

The author believes that a similar representation should exist in electing a President. Both all eligible voters in the country and states as equal members of the Union should "approve" a presidential candidate to let the person be elected to the office of President. Certainly, the approval of the voting voters may come in different forms, which should reflect a particular perception of society of who should be an elected President.

In the framework of the author's approach, both the Electoral College mechanism for awarding the so-called "pseudo-electoral" votes (see Sect. 7.2), and the mechanism that the House of Representatives currently uses for electing a President are considered protective mechanisms. The presence of both election mechanisms in the modified system guarantees that a President will be elected without run-off elections if no election stalemate occurs (see Chap. 3).

Only presidential candidates who received at least a certain number of “pseudo-electoral” votes should be considered in electing a President in the House of Representatives (which is the first of the above two changes). For instance, if three candidates receive 269, 267, and 2 “pseudo-electoral” votes, respectively, only the first two candidates should be eligible to be considered by the House of Representatives. This certain number can be calculated by means of a simple formula, proposed in [22].

The current Electoral College-based election system may elect President a compromise presidential candidate—who receives a majority of electoral votes in the Electoral College—[1, 18, 22], and this candidate may or may not be perceived by society as the best choice for the country. This may be the case, for instance, if the election winner does not win the popular vote nationwide, construed as the tally of votes cast for all the states of state and D.C. presidential electors throughout the country.

In contrast, the modified election system always gives priority to the candidate who is better than the compromise one, produced by the current system, i.e., to a presidential candidate who receives a majority of the popular nationwide, along with majorities of the votes cast in each of at least any 26 states or in each of at least any 25 states and in D.C. (Here, the notion of a better candidate than a compromise one is applied independently of whether any compromise candidate physically exists in a particular presidential election.) If a better candidate than the compromise one does not exist in a particular presidential election, whereas the compromise candidate does, the modified election system makes this compromise candidate an elected President. Finally, if even a compromise candidate does not exist in a particular presidential election, the House of Representatives elects a President according to the rules that are in use in the current election system.

The receiving of a certain number of “pseudo-electoral votes” to participate in electing a President in the House of Representatives would be required only if there is no candidate who is perceived by society as better than the compromise candidate in the election. In the proposed modified election system, the awarding of “pseudo-electoral votes” would replace the process of appointing state and D.C. electors to represent them in the Electoral College. However, the awarding of “pseudo-electoral votes” would be employed only in those states in which voter turnouts were sufficient to consider this procedure legitimate. In all the places (states and D.C.) with a negligible voter turnout, state electors would be appointed as “... the Legislature thereof may direct...” [19]. Thus, both electoral votes from the places (states and D.C.) with a negligible voter turnout and “pseudo-electoral votes” from the rest of the places can turn out to be counted in Congress [22]. If no presidential candidate receives a majority of all the awarded “pseudo-electoral votes” and electoral votes cast by all the appointed electors, and there is no presidential candidate who is better than a compromise one, under the rules of the modified election system, a President will be elected in Congress as the Twelfth Amendment directs.

The society’s perception of who should be elected President may vary, and it seems to depend on several factors.

The awareness of constitutional provisions underlying the election system, historical circumstances, emotional feelings about the country as a Union, and political propaganda are only a few such factors. Certainly, the above perception may not coincide with the currently assumed one. Thus, for instance, the compromise candidate, elected by the Electoral College, may not necessarily always be the best option for the country according to the society's perception.

From the author's viewpoint, the people's perceptions of the matter are purely subjective and may be discussed only at the level of "my opinion versus your opinion." Examples of such possible perceptions, which, however, do not exhaust the totality of them, are presented in [22]. At the same time, detecting which particular perception currently dominates in society may require holding national referenda.

One such possible perception is associated with the three concepts of the Presidency, introduced by the author in [22]. The discussion of these concepts may help better comprehend this perception, as well as better understand whether the current election system should be changed or replaced with another one.

The first concept of the Presidency is "President of the people." If a presidential candidate receives a majority of the popular vote nationwide in an election, he can be viewed as "President of the people." However, this majority can represent the will of the nation only if the voter turnout exceeds 50 % of all eligible voters on Election Day [1, 18, 22].

The second concept is "President of the states." If a presidential candidate is a choice of a majority of the places (states and D.C.) as equal members of the Union, one may call her/him a "President of the states." This concept was introduced by the Founding Fathers in the framework of the mechanism for electing a President in Congress. Article 2 of the Constitution determined basic principles of this election mechanism, and Congress developed these principles by adopting the rules of 1825 (see Sect. 2.5).

At the time of adopting the Constitution, the will of a state as a whole in electing a President could be expressed only by its delegation in the House of Representatives. Also, this will could be manifested only if electing a President was thrown into Congress. Today, the choice of a state or D.C. can also be expressed by a majority or a plurality of the statewide (and district-wide in D.C.) popular vote.

The rules of 1825 require that only a majority rather than a plurality of a state delegation in the House of Representatives consisting of more than one-member can ascertain the vote of the state in electing a President there. Therefore, it seems logical to require that a "President of the states" elected according to the direct popular will of the states and D.C. would be a recipient of a majority of the popular vote in each of at least 26 states or in each of at least 25 states and in D.C. [1, 18, 22].

The second concept of the Presidency, proposed in [22], incorporates this requirement.

The third concept of the Presidency is "President of an electoral majority in the Electoral College." This concept was introduced by the Founding Fathers in Article 2 of the Constitution and was later modified by the Twelfth Amendment.

Currently, a “President of an electoral majority in the Electoral College” can be elected only according to the will of electors, who, constitutionally, are free agents and, generally, can elect whoever they want. However, a “President of an electoral majority in the Electoral College” can be elected directly by the states and D.C. If this were the case, the compromise candidate would always be a presidential candidate rather than any person picked by electors.

Proponents of the current election system, apparently, imply that a “President of an electoral majority in the Electoral College” (if such a person exists in the election) or a “President of the states” elected by the House of Representatives always represent the country’s best choice for the office of President.

However, American society may view it differently. For instance, voters may believe that a presidential candidate who is both a “President of the people” and a “President of the states” according to the direct popular will of the states and D.C. is a better choice for the country. Moreover, this perception may hold even when a “President of an electoral majority in the Electoral College” also exists. (All the three presidential candidates can exist in a particular presidential election [18], and one candidate may “hold” any two of the above three or even all the three “titles.”)

Besides this particular perception of which presidential candidate is a better (than the compromise) candidate, the American people may believe that, for instance, a presidential candidate who is only a “President of the people” is always the best choice for the office of President. Certainly, other perceptions are also possible [22].

The modified election system would work as follows:

1. “On the Tuesday next after the first Monday ...” in the month of November of the election year, voters vote for presidential and vice-presidential candidates in their (voters’) respective states and in D.C. Short ballots or similar voting schemes are used in the precincts.

The states and D.C. certify the results of this voting (the popular vote distribution) in December of the election year. They either award “pseudo-electoral votes” to a pair of presidential and vice-presidential candidates in the manner in which the states choose electors, or appoint electors. The appointing of state electors is done only if the voter turnout in the state is negligibly small to award “pseudo-electoral votes” according to the will of the state.

Congress tallies the (certified) popular vote received by the pairs of the candidates in the states and in D.C. and counts both the awarded “pseudo-electoral votes” and electoral votes (cast by the electors in the places with a negligible voter turnout) in the January that follows the election year.

2. Case 1. The nationwide voter turnout does not exceed 50 % of all eligible voters in the election. Then the election outcome is determined according to the current election rules. The following two situations are possible:
 - (a) One pair of presidential and vice-presidential candidates receives a majority of all “pseudo-electoral votes” awarded by the states and D.C. and votes cast by the electors in places with a negligible voter turnout. This pair of the

candidates is considered elected to the offices of President and Vice President.

- (b) No pair of presidential and vice-presidential candidates receives such a majority. Then the election of both a President and a Vice President is thrown into Congress, which is to elect both executives as the Twelfth and the Twentieth Amendments direct.

Case 2. The nationwide voter turnout exceeds 50 % of all eligible voters in the election. Then a pair of presidential and vice-presidential candidates may be chosen according to the people's perception of who should win the Presidency.

One such perception, considered earlier in this section, may give priority to a presidential candidate with a majority of the nationwide popular vote and majorities of the popular vote in at least 26 places out of 51 places (states and D.C.), voting in presidential elections. A presidential candidate who is a recipient of both is (a) a "President of the people" according to the direct popular will of the nation, and (b) a "President of the states" according to the direct popular will of the places. This candidate is elected to the office of President even if a "President of an electoral majority in the Electoral College" also exists in the election.

One may require that the voter turnout should exceed 50 % of all eligible voters residing in each of the above-mentioned (at least) 26 places (states and D.C.) to speak about a "President of the states" elected according to the will of the places [22]. However, the states may decide that this is not necessary and that a certain substantial percentage of all eligible state votes can express the will of the state. Certainly, D.C. voters may have the same position on the matter.

Thus, if the voter turnout does not exceed 50 % of all eligible voters in the country, the current election rules determine the election outcome. That is, if this is the case, a presidential candidate who received a majority of all the "pseudo-electoral votes" that are in play in the election (and, possibly, electoral votes cast in the places with a negligible voter turnout), i.e., a "President of an electoral majority in the Electoral College" is elected to the office of President. If, however, no such presidential candidate exists in the election in this case, the House of Representatives elects President a "President of the states" according to the Twelfth Amendment and in line with the 1825 rules.

Also, the current election rules determine the outcome when (a) the voter turnout exceeds 50 % of all eligible voters, and (b) no presidential candidate is both a "President of the people" and a "President of the states" according to the direct popular will of the nation and of voting voters in the states and D.C.

The presented description of how the modified election system works reflects a particular perception of society of who should be elected President. Though other perceptions are possible [22], the author views the presented perception as the one underlying the ideas of the Founding Fathers on electing a President [1, 18, 22].

The difference between the current and the modified election system is obvious. The modified system always gives preference to a presidential candidate who is perceived by society as a better candidate than the compromise one. Only if a better

candidate does not exist, or more than 50 % of all eligible voters do not vote in the election, does the existing election system take over.

In contrast, the current system always refuses any candidates other than the compromise one. This happens even if the compromise candidate is a choice of, say, less than 30 % of all eligible voters from less than 30 % of the places (states and D.C.). For instance, the Electoral College may elect President a presidential candidate even if 39 states and D.C. unanimously oppose this choice by favoring any other (though one and the same) candidate [18].

Certainly, the current election system may, eventually, elect President a presidential candidate who, according to the direct popular will of the nation and the will of voting voters in the states and in D.C. is a “President of the people,” a “President of the states,” and a “President of an electoral majority in the Electoral College.” Examples of such election outcomes in the last 50 years are well known [22].

However, generally, the current system does not encourage presidential candidates to campaign across the country. Moreover, the existing election rules may make it reasonable to focus the election campaign on a relatively small bloc of “victorious states.” (A bloc of the states is “victorious” if these states control at least a majority of all the electoral votes that are in play in the election.)

The modified election system would use a new method for awarding state electoral votes, first proposed in [18]. This method has the potential of turning almost all the states that are currently “safe” into “battlegrounds.” The idea of this method is to eliminate any certainty that a major party candidate may have in the outcome of a statewide election. This can be achieved by making the number of state electoral votes to be received by the state’s favorite dependent on how many counties he carries in the state.

Let the state’s favorite—i.e., a presidential candidate who receives at least a plurality of the votes in a statewide election held to determine the state’s popular vote winner—win by pluralities of votes in a majority of all the state counties. Then the state’s favorite wins all the state electoral votes that are in play in the election. However, if this favorite does not win in a majority of all the state counties, the electoral votes are awarded according to the proportional method for awarding state electoral votes (see Sect. 2.9).

To illustrate how the proposed method for awarding state electoral votes would work, consider the state of Minnesota with 87 counties, which had 10 electoral votes in the 2008 election (and has the same number of the electoral votes in the 2016 election as well). If a candidate had received a plurality of the votes cast in the state in that election, along with pluralities of votes cast in each of at least 44 counties, he would have won all the 10 electoral votes.

Now, let us assume that candidate A from a major party received 60 % of all the votes cast, whereas candidate B from the other major party received 35 % of all the votes cast. Further, let us assume that candidate A won by at least pluralities of votes cast in each of 30 counties out of the 87 counties. Then candidate A would win only 6 electoral votes out of 10, and candidate B would win the remaining 4 electoral votes. If, however, candidates A, B, and C received 60, 30, and 10 % of all the votes cast in the state, whereas candidate A still won in each of some 30

counties out of 87, candidate A would receive 6 electoral votes, candidate B would receive 3 electoral votes, and candidate C would receive 1 electoral vote.

Not only does the proposed method encourage all presidential candidates who are on the ballot in a state to compete for every vote, it encourages them to compete in every county of the state. In the above example, losing 4 electoral votes can make a difference in a close election. For instance, in the 2000 election, this was exactly the margin of electoral votes that George W. Bush won. Also, Hawaii, Maine, Rhode Island, Nevada, and New Hampshire each awarded 4 electoral votes in the 2000 election.

Currently, if a presidential candidate is guaranteed to receive, say, at least 60 % of the votes in a state that awards all its electoral votes according to the “winner-take-all” method, she/he considers this state “safe,” and she/he is likely not to campaign there. However, this 60 % of the votes may be received in a relatively small number of populated counties.

In contrast, under the proposed method for awarding state electoral votes, the state’s favorite may expect to receive only 6 out of 10 state electoral votes, and she/he needs to campaign in the state to receive all the 10 electoral votes. Moreover, if this state’s favorite hopes to receive 6 electoral votes out of 10 without campaigning there, her/his major opponent may wage a strong campaign in the state and decrease the number of electoral votes that the state’s favorite expects to receive.

The proposed method for awarding state electoral votes may encourage presidential candidates other than the state’s favorite to campaign in the state only if the favorite’s expected share of votes does not let him win all the state electoral votes. This may be the case in the small states. Indeed, let a state be entitled to 3 electoral votes, and let the state favorite’s expected share of votes in the state be 60 %. Then the favorite may expect to receive only 2 out of 3 state electoral votes, whereas, say, her/his opponent from the other major party may receive the remaining electoral vote. If, however, the state’s favorite is likely to receive 85 % of all the votes cast, then he can expect to receive all the three electoral votes.

Thus, receiving 85 % of all the votes cast in a state controlling 10 electoral votes and in a state controlling only 3 electoral votes may lead to different outcomes for the state favorites and for their opponents in both states.

The idea of using the proportional method for awarding state electoral votes if the state’s favorite does not win in a majority of the state counties looks fair. However, its implementation presents considerable practical difficulties in rounding-off the number of the electoral votes to be awarded to the candidates. For instance, in the above example for a state with 3 electoral votes and 60 % of the votes cast received by the state’s favorite, it is not clear how to award the remaining one electoral vote. Indeed, if, say, two more presidential candidates receive 25 and 15 % of all the votes cast, respectively, it is not clear how to remain in line with the Supreme Court requirements to have an equal weight for every vote cast in a statewide election [61, 62].

However, the same idea of eliminating any guarantees for the state’s favorite can be implemented with the use of the Maine-like district method for awarding state electoral votes instead of the proportional method. The criterion of choosing one of

the two methods—the “winner-take-all” method or the Maine-like district one—remains the same. That is, if the state’s favorite wins in a majority of the state counties, he is awarded all the state electoral votes as if the “winner-take-all” method were in force. If the state’s favorite does not win in a majority of the state counties, the state electoral votes are awarded according to the Maine-like district method, as if this method were in force [1].

The proposed modified election system can be introduced only in the form of a new amendment to the Constitution. However, amendments to the Constitution aimed at changing the current election system have so far failed to be introduced [4, 6, 7, 10, 71].

The modified election system implies changing the first concept of the existing election system (see Sect. 2.3). This concept is the definition of a person elected President:

- (a) A recipient of a majority of all the electoral votes that are in play in the election, which is established as a result of counting electoral votes in Congress in the January that follows the election year, and
- (b) A recipient of a majority of state votes from (currently 50) state delegations if the election of a President is thrown into Congress, which is established by tallying the votes cast by state delegations in the House of Representatives in the January that follows the election year (one vote by each state delegation).

Without changing this conception, some extreme election outcomes, for instance, those presented in Examples 2.5 and 2.6 from Sect. 2.2 cannot be eliminated.

Though the rationale presented in this chapter deals only with electing a President, corresponding procedures for electing a Vice President can easily be developed [1, 18].

Finally, the author would like to summarize the major features the modified election system.

First, the modified election system builds on the current election system, rather than calls for changing any basic elements of the current election system. (“Pseudo-electoral votes” and the formula for selecting the number of persons to participate in electing a President in the House of Representatives are the only two exceptions.) It incorporates the existing system while allowing more options to choose a President.

Second, under the modified election system, the best presidential candidate is the one preferred by all eligible voters and by the places (states and D.C.), and the will of the places is expressed by the voting voters directly. From the author’s viewpoint, the will of all eligible voters is expressed only if more than 50 % of all eligible voters voted in the election. If this is not the case, then a majority of the electorate either do not care or do not believe that (the electors of) presidential candidates deserve their votes in the election.

Third, under the modified election system, the first attempt to elect a President implements a “mixed” form of representation. That is, the requirement to elect President a “President of the people” secures equal representation of the American

people in the election, whereas the requirement to elect President a “President of the states” secures equal representation of the states in the election.

Under the modified election system, the awarding of “pseudo-electoral” votes and, possibly, electoral votes (in the places (states and D.C.) with a negligible voter turnout) constitutes the second attempt to elect a President. However, the second attempt is undertaken only if there is no person who is both a “President of the people” and a “President of the states” in the election. If the second attempt takes place, there is no equal representation of either the people or the states. The unequal representation is the same that exists in the Electoral College if all the electors from each state and D.C., chosen by popular elections, vote faithfully.

Should both attempts to elect a President under the modified election system fail, a particular form of equal representation of the states, though not via the direct will of voters from each state, is used in electing a President in the House of Representatives.

Does the modified election system have a chance?

Traditionally, political pundits seem to believe that the Electoral College is impervious to change, and it cannot be abolished, since the equal suffrage of the states in amending the Constitution [19] discourages attempts to reform this election mechanism. However, the progress that the National Popular Vote movement has made in pushing through the NPV plan, especially in several small states, has made some of the pundits believe that changing the essence of this election mechanism is within reach.

Since no real discussion and explanation of the NPV plan to the American people has been offered, it remains unclear whether the state legislators, who sponsor the NPV plan in these small states, understand what their states gain and what they lose. It seems that these state legislators trade the constitutionally guaranteed right of their states to have a say in deciding the election outcome for the quite illusory, unsubstantiated wishful thinking of the NPV plan originators. That is, these originators assert that under the NPV plan, votes in their states will be as important for major party candidates as will be the votes in the large states. In any case, despite the current support of respondents to the Gallup polls to abolish the Electoral College, it seems that there are not enough states to support a constitutional amendment calling for changing the current election system.

A fairer treatment of all the states in deciding the election outcome may result in their support of the use of the “one person, one vote” principle that underlies all other elections in the country. Thus, an election system offering such a treatment seems to have a chance to win the approval of at least the three-fourths of state legislatures necessary to introduce a corresponding constitutional amendment.

The modified election system allows a candidate with (a) the nationwide popular vote majority, and (b) popular vote majorities or (determined by the states) pluralities, in at least 26 states (or in at least 25 states and D.C.) to win the Presidency even if somebody else wins the Electoral College. (This could have been the case in the 2004 Election had some 65,000 Ohio voters switched, favoring the Democratic Party candidate.) However, to have the nationwide popular vote majority favoring the same person, more than 50 % of all eligible voters must vote.

If the nationwide voter turnout exceeds 50 % of all eligible voters in the country, and there is no such candidate, the candidate who wins in the Electoral College becomes the next President. If neither of the two candidates exists, the House of Representatives chooses a President according to the rules specified by the Twelfth and the Twentieth Amendments.

Should less than 50 % of all eligible voters vote, signaling that a majority of voters either do not care or believe that (the electors of) the participating candidates do not deserve their votes, either the Electoral College or the House of Representatives elects a President according to the existing election rules.

Only with more than 50 % of all eligible voters voting, may these new election rules—building on the existing ones—benefit society in close elections. This “more than 50 % requirement” to make the popular vote a decisive factor in electing a President, along with keeping the existing election system as a back up, differentiates the proposed modified election system from the Federal System Plan of 1970.

The rules of the modified election system make all the states vital for both major party candidates. To win the popular vote nationwide, both candidates are likely to compete in large states. To win in at least 26 states, both candidates are likely to compete in small states. As any close elections can hardly be won inside only 26 large and small states, both candidates are likely to compete in the medium-size states as well.

In contrast, the “winner-take-all” principle makes most large and small states “safe” for either major party candidate, so these states are almost ignored in the “battleground-kind” election campaigns, except for fundraising purposes.

Under these new rules, small states retain what they enjoy under the Electoral College and gain by becoming vital for winning in at least 26 states. Large states gain since the “winner-take-all” principle will not waste votes favoring the state’s runner-up, making both major candidates interested in competing there. Medium states do not lose, as they remain valuable should the Electoral College mechanism decide the election outcome, and gain as a source for both the popular vote and prospective 26 “victorious” states. As a result, under the modified election system, election campaigns are likely to be run by both major parties in all the states.

Both the “one person, one vote” and the “one state, one vote” principles become decisive in electing a President. The “one state, one vote” addresses federalist concerns [10], [71] in determining whether there is a “President of the states” in the election according to the direct popular will of the states.

In contrast, the current election system determines the election winner according to the “one state, one vote” principle only if a President is elected by Congress. Moreover, in this case, the will of a state can be expressed only via the state delegation in the House of Representatives.

Since the modified election system retains the Electoral College as a back-up system, the chances of multi-candidate elections do not seem to increase. The use of direct popular will of voting voters in determining the election winner both nationwide and in the states opens doors for considering numerous ranked-choice voting schemes and approval voting [77].

The introduction of the modified election system requires a constitutional amendment. Such an amendment should address (a) details of the new election rules and the rights of the states within these rules, (b) detected flaws in the Constitution capable of causing weird election outcomes and constitutional crises, and (c) the automatic plan of counting electoral votes and “pseudo-electoral” votes to eliminate the “faithless elector problem.”

The amendment should finally address the right of the American people to vote for President and for Vice President in presidential elections. If granted, this right would make irrelevant the right to vote for presidential electors in the states. However, state legislatures should retain the right to appoint electors in the states, as Article 2 of the Constitution directs, under any low voter turnout, when the awarding of “pseudo-electoral” votes cannot be considered legitimate.

The Founding Fathers devised the Electoral College as part of a compromise to keep the states of free settlers together as a nation. By leaving several key issues of this unique election mechanism unaddressed, they might have believed that new generations of Americans would propose a better election system or at least a better compromise as the country developed (see Sect. 2.2), rather than debating the Electoral College for more than two centuries.

The modified election system may turn out to be such a better compromise, where all the voters gain, and no state loses. This system (a) builds on the current one, (b) uses the existing election mechanisms only as a back-up system, (c) gives the American people a chance to elect a Chief Executive of the Union by directly voting for President and Vice President, (d) treats the states as equal members of the Union, and (e) equalizes the will of the nation as a whole and the will of all the 50 states and D.C.

The modified election system is likely to motivate more Americans to vote in presidential elections, and it is likely to encourage all presidential candidates to compete for votes throughout the country.

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